United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-2131 76-2144

To be argued by
KEVIN J. McKAY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-2131
Docket No. 76-2144

UNITED STATES ex rel. EDWARD FARRELL,

Petitioner-Appellant,

-against-

JACK CZARNETZKY, Superintendent of Eastern Correctional Facility,

Respondent-Appellee.

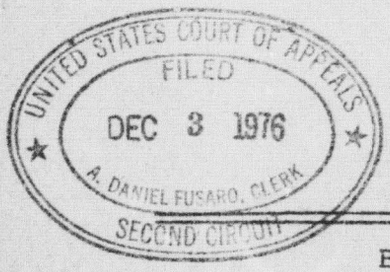
UNITED STATES ex rel. CHAUNCEY REIDOUT,

Petitioner-Appellee,

-against-

ROBERT HENDERSON, Superintendent of Auburn Correctional Facility,

Respondent-Appellant.



ON APPEAL FROM TWO DECISIONS IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR RESPONDENT-APPELLEE-APPELLANT

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Statutes Involved

"§ 160.15 Robbery in the First Degree

"A person is guilty of robbery in the first degree when he forcibly steals property and when, in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime: * * *

"4. Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; except that in any prosecution under this subdivision, it is an affirmative defense that such pistol, revolver, rifle, shotgun, machine gun or other firearm was not a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, could be discharged. Nothing contained in this subdivision shall constitute a defense to a prosecution for, or preclude a conviction of, robbery in the second degree, robbery in the third degree or any other crime."

* * * *

"§ 160.10 Robbery in the Second Degree

"A person is guilty of robbery in the second degree when he forcibly steals property and when: * * *

"2. In the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime:* * *

"(b) Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm."

* * * *

"§ 25.00 Defenses; burden of proof * * *

"2. When a defense declared by statute to be an 'affirmative defense' is raised at a trial, the defendant has the burden of establishing such defense by a preponderance of the evidence."

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BRIEF FOR RESPONDENT-APPELLEE-APPELLANT

Question Presented

Does Section 160.15(4) of the New York Penal Law violate the Due Process Clause because it places upon the defendant the burden of proving that the weapon used in the robbery was unloaded or inoperable in order to reduce the charge from robbery in the first degree to robbery in the second degree?

Preliminary Statement

The appeal in Farrell v. Czarnetzky, 76 Civ.-2355, is from an order of the United States District Court for the Southern District of New York (Metzner, D.J.), dated August 4, 1976, which dismissed petitioner's application for a writ of habeas corpus and upheld the constitutionality of Section 160.15(4) of the Penal Law.

The appeal in Reidout v. Henderson, 76 Civ. 3836, is from an order of the United States District Court for the Southern District of New York (Frankel, D.J.), dated October 13, 1976, which granted petitioner's application for a writ of habeas corpus and held that Section 160.15(4) violates the doctrine set forth in Mullaney v. Wilbur, 421 U.S. 684 (1975).

On November 11, 1976, the Honorable William H. Timbers granted a motion to consolidate the appeals since they both involved the constitutionality of Section 160.15(4) of the Penal Law.

Statement of Facts and Proceedings Below

(A) Farrell v. Czarnetzky, 76 Civ. 2355.

Edward Farrell is presently incarcerated in Eastern New York Correctional Facility pursuant to a judgment of conviction rendered by the Supreme Court, Bronx County (Drohan, J.) on June 4, 1974. After a trial by jury, petitioner was convicted of robbery in the first degree (two counts) and possession of a weapon as a misdemeanor. Petitioner was sentenced to concurrent terms of imprisonment of five to fifteen years on the robbery charges and a one year sentence on the weapons count.

Around midnight on March 10, 1972, Juan Rivera who was driving a gypsy cab picked up Farrell and a male companion. Soon thereafter, they ordered Rivera to stop his car and ordered him into the hallway of a building where they robbed him at gunpoint. Approximately one half hour later, Aaron Jones, a medallion taxi driver, was robbed at gunpoint by Farrell and his companion in the hallway of the same building where Rivera was robbed.

Jones reported the robbery to the police at the 41st Precinct. The police drove Jones around the neighborhood of the crime in an unmarked car to see if he could recognize the robbers. After cruising for a short time, Jones spotted Farrell who was still wearing the same clothes he had on when

he robbed him. The policemen arrested Farrell and took him to the police precinct. Both Rivera and Jones positively identified Farrell. A search of Farrell's clothes revealed a cigarette lighter belonging to Jones. The guns used by Farrell and his accomplice were not fired during the robberies and were never recovered. Farrell presented an alibi defense claiming that he was at home watching television when the crimes occurred.

On October 16, 1975, the Appellate Division, First Department reversed the conviction on the weapons count and dismissed that count of the indictment and, as so modified, affirmed the judgment (49 A D 2d 836). Leave to appeal to the Court of Appeals was denied by Judge Lawrence H. Cooke on November 28, 1975.

On May 25, 1976, petitioner filed a petition for a a writ of habeas corpus in the United States District Court for the Southern District of New York, claiming that Section 160.15(4) of the robbery statute violated the Due Process Clause of the Fourteenth Amendment. Judge Charles M. Metzner dismissed the petition in an opinion dated August 4, 1976 (417 F. Supp. 987) wherein he concluded that the decision in Mullaney v. Wilbur, 421 U.S. 684 (1975) was inapplicable to the affirmative defense provided in Section 160.15(4) and that the constitutionality of Section 160.15(4) had been upheld in People v. Felder, 39 A D 2d 373 (2d Dept. 1973), aff'd, 32 N Y 2d 747 (1973), appeal

dismissed for want of a substantial federal question, 414 U.S. 948 (1973). Judge Metzner granted petitioner leave to proceed in forma pauperis on August 23, 1976 and granted petitioner's application for a certificate of probable cause on October 15, 1976.

(B) Reidout v. Henderson, 76 Civ. 3836.

Chauncey Reidout is currently imprisoned at Auburn Correctional Facility pursuant to a judgment of conviction rendered on May 29, 1974 by the Supreme Court, Bronx County, (Sullivan, J.), convicting him, after a trial by jury, of robbery in the first degree. Reidout was sentenced to an indeterminate term of five to fifteen years.

On July 24, 1971, Arneta Walker was forced up onto the roof of her building by Reidout. Once on the roof, Miss Walker was raped and robbed of her money at gunpoint. Miss Walker's wallet and Reidout's billfold which contained his identification were later found by police on the roof of the building. Reidout was indicted on May 25, 1972, for robbery in the first degree, grand larceny in the third degree and possession of a weapon. The weapon used by Reidout was not fired during the robbery and was not recovered by the police.

On November 13, 1975, the Appellate Division, First Department affirmed the judgment of conviction. (50 A D 2d 726). Leave to appeal to the Court of Appeals was denied on February 4, 1976 by Judge Sol Wachtler.

In a petition for a writ of habeas corpus dated July 27, 1976, Reidout challenged the constitutionality of Section 160.15(4) and argued that it violated due process and the doctrine set forth in Mullaney v. Wilbur, supra. On October 13, 1976, Judge Marvin E. Frankel granted the writ and held that the affirmative defense in the robbery statute was invalidated by Mullaney v. Wilbur, supra.

Opinions of the District Court

In denying Farrell's petition for a writ of habeas corpus, Judge Metzner held Mullaney v. Wilbur, supra, inapplicable to Section 160.15(4) and relied upon People v. Felder, 39 A D 2d 373 (2d Dept. 1973), aff'd 32 N Y 2d 747 (1973), appeal dismissed for want of a substantial federal question, 414 U.S. 948 (1973).

In Reidout, Judge Frankel granted the writ and concluded that the doctrine of Mullaney v. Wilbur controlled the affirmative defense in the robbery statute and was violative of due process.

POINT I

SECTION 160.15(4) OF THE PENAL LAW WHICH ALLOWS A DEFENDANT CHARGED WITH ROBBERY IN THE FIRST DEGREE TO REDUCE HIS CRIME TO ROBBERY IN THE SECOND DEGREE BY ESTABLISHING THAT THE GUN DISPLAYED IN THE ROBBERY WAS UNLOADED OR INOPERABLE COMPORTS FULLY WITH THE DUE PROCESS CLAUSE.

Section 160.15(4) of the Penal Law provides a defendant charged with robbery in the first degree with an affirmative defense to reduce his crime to robbery in the second degree by establishing, by a preponderance of the evidence, that the gun displayed in the robbery was unloaded or inoperable. This affirmative defense is neither repugnant to the due process clause nor violative of the principles pronounced in Mullaney v. Wilbur, 421 U.S. 684 (1975).

In Mullaney, which is petitioners' main source of authority for challenging § 160.15(4), the Supreme Court struck down a Maine homicide statute because it required the defendant to prove that he had committed the murder in the heat of passion on sudden provocation in order to reduce the charge of murder to manslaughter.* Under Maine Law, the critical

* Petitioners' standing to challenge the constitutionality of § 160.15(4) is cast in doubt by reason of their failure to utilize the affirmative defense at trial. Neither petitioners asserted that a gun existed but was unloaded or inoperable. Petitioner in Farrell relied on an alibi defense and the petitioner in Reidout argued a defense of mistaken identities. Thus, petitioners' challenge to § 160.15(4) is not in the proper context. See Voeller v. Neilston Warehouse Co., 311 U.S. 531, 537 (1941); Ashwander v. TVA, 297 U.S. 288, 347-8 (1936); cf. United States v. Raines, 362 U.S. 17, 21 (1960.

element of the crime of murder, malice aforethought, was presumed and the defendant was shackled with the burden of disproving that element in order to reduce the nature of the crime. The effect of this requirement was interpreted by the Supreme Court to relieve the prosecution of its burden to prove all the elements of the crime beyond a reasonable doubt in contravention of the doctrine enunciated in In Re Winship, 397 U.S. 358 (1970).

The statute in Mullaney was invalidated because it attempted to blend two differing offenses, murder and manslaughter, into one crime of felonious homicide and relieve the prosecution of proving the essential element of intent of the defendant. It has long been recognized that murder and manslaughter are generically different offenses. It was Maine's "redefinition of homicide" that "effect[ed] an unconstitutional shift in the State's traditional burden of proof." Mullaney v. Wilbur, supra at 706 (Concurring Opinion of Justice Rehnquist). People v. Archie, 85 Misc 2d 243, 246 (Sup. Ct. Erie Co. 1976). However, the robbery statute in New York has undergone no such "redefinition", is a single generic offense with differing degrees and does not relieve the prosecution of its burden to prove all the essential elements.

It must be stated at the outset that the constitutionality of § 160.15(4) has been upheld by the United States Supreme Court in People v. Felder, 39 A D 2d 373 (2d Dept. 1973), aff'd. 32 N Y 2d 747 (1973), appeal dismissed for want of a substantial federal question, 414 U.S. 948 (1973).

The Court in People v. Felder, supra, found no constitutional infirmity in § 160.15(4) since the prosecution was still required to "establish every element of the substantive crime." Felder, supra at 379. While Felder was decided before Mullaney, the Court's decision in Mullaney has not sub silentio overruled Felder. In dismissing the appeal in Felder for want of a substantial federal question, the Supreme Court has, in effect, dismissed the case on the merits. This view was clearly illustrated in Hicks v. Miranda, 422 U.S. 332, 344 (1975) wherein the Court stated:

> "...'[v]otes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case....' Ohio ex rel. Eaton v. Price, 360 U.S. 246, 247 (1959)... (citation omitted)...'unless and until the Supreme Court should instruct otherwise, inferior federal courts had best adhere to the view that if the court has branded a question as unsubstantial, it remains so except when doctrinal developments indicate otherwise...' (citation omitted)... the lower courts are bound by summary decisions by this Court 'until such time as the court informs [them] that [they] are not.'"

In his appeal to the U.S. Supreme Court, Felder argued that § 160.15(4), by shifting the burden of proof on the affirmative defense to the defendant, violated due process. Maine's first petition for certiorari in Mullaney raising a similar issue was filed on April 26, 1973 and not decided until January 14, 1974 (414 U.S. 1139). With the Mullaney petition for certiorari before it, the Supreme Court dismissed the appeal in Felder on October 23, 1973. Thus, the Supreme Court found absent in Felder, the due process violation it ultimately found in Mullaney.

Section 160.15(4) is strikingly different from the Maine homicide statute in Mullaney. The affirmative defense in § 160.15(4) does not, in any way, relieve the prosecution of its burden of proof on any of the elements of robbery. Section 160.15(4) still requires the prosecution to prove beyond a reasonable doubt that property was forcibly taken by the display of what appears to be a firearm. Unlike Mullaney, where the fact presumed, malice aforethought, is an element of the crime, the fact presumed in the cases at bar, that the gun was loaded, is not an essential element of the crime of robbery.

The "existence or nonexistence of bullets in a firearm bears no necessary relationship to the required elements of the crime of robbery." People v. Archie, supra, at 250;

Mullaney v. Wilbur, supra at 706. As stated by Judge Metzner in Farrell v. Czarnetzky, supra, at pp. 4-5:

> "Section 160.15 requires that the prosecution prove beyond a reasonable doubt that the defendant forcibly took property by the display of what appears to be a firearm. The fact that the firearm is loaded is not an essential element of the crime of robbery and the prosecution is not relieved of any of its burden of proof."

Section 160.15(4) was enacted to resolve the difficulty encountered in proving that the defendant's weapon was loaded when the gun was not fired and the defendant was not swiftly apprehended with the weapon.* If the gun was not fired, the victim could only testify that the robber held what appeared to be a gun, but could not possibly state whether it was loaded. While § 160.15(4) creates a presumption that the gun was loaded, it also affords the robber "an opportunity to fight his way out

* Prior to the enactment of the Penal Law of 1965, robbery in the first degree was defined as, inter alia, forcible stealing when "being armed with a dangerous weapon." (Penal Law of 1909, § 2124(1)). An unloaded weapon was a dangerous weapon under that statute (People v. Roden, 21 N Y 2d 810 (1968). When the Penal Law was revised in 1965, the term "deadly weapon" was used in lieu of "dangerous weapon" as an element of robbery in the first degree. A "deadly weapon" was defined as a loaded and operable firearm. (§ 10.00(12) P.L.). The New York courts held that there had to be direct proof that the gun contained bullets and no inference that the gun was loaded could be drawn. People v. Gordon, 19 A D 2d 828 (2d Dept. 1963); People v. Dade, 15 A D 2d 629 (4th Dept. 1961). In order to clarify what was fast becoming an imbroglio, § 160.15 was amended (Laws 1969, Ch. 1012 §4) to include a presumption that the gun in a robbery was loaded and operable.

of a first degree conviction if he can prove that the gun was either unloaded or incapable of being fired." Arnold Hechtman, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 39, § 160.15, p. 206. Section 160.15(4) acts as an ameliorative factor which affords the defendant an opportunity to reduce the charge.

In the recent case of United States ex rel. Robinson v. Henderson, 75 Civ. 1852 (E.D.N.Y. March 10, 1976), aff'd. 538 F. 2d 313 (2d Cir. 1976), cert denied, 45 U.S.L.W. 3342 (November 8, 1976) a smiliar situation to the cases at bar existed. In Robinson, supra, petitioner challenged the affirmative defense in the felony murder statute, N.Y. Penal Law § 125.25(3), which provides the non-killer defendant with an opportunity to extricate himself from liability for murder, but not from the underlying felony. The affirmative defense allowed the defendant to fight his way out of a felony murder charge by proving by a preponderance of the evidence that he did not commit the murder, was unarmed, had no reason to believe that the other participants were armed or would engage in conduct likely to result in death. Since the prosecutor was not relieved of proving any essential element of felony murder and the affirmative defense was merely intended to alleviate the harsh result of the predecessor statute (§ 1044(2) P.L.), the Court held that § 125.25(3) did not violate due process as explicated in Mullaney.

The Supreme Court in Mullaney had no intention of striking down all the affirmative defenses and presumptions it has created over the years.* (See Mullaney, p. 702 fn. 31). This conclusion is evidenced by Justice Rehnquist's statement in his concurring opinion at p. 705:

> "I agree with the Court that In Re Winship, 397 U.S. 358 (1970), does require that the prosecution prove beyond a reasonable doubt every element which constitutes the crime charges against a defendant. I see no inconsistency between that holding and the holding of Leland v. Oregon, 343 U.S. 790 (1952). In the latter case this Court held that there was no constitutional requirement that the state shoulder the burden of proving the sanity of the defendant."

* See Davis v. United States, 160 U.S. 469 (1895) (presumption of sanity); Yee Hem v. United States, 268 U.S. 178 (1925) (presumption that opium was imported); Leland v. Oregon, 343 U.S. 790 (1952) (defendant has burden of proving insanity defense); United States v. Gainey, 380 U.S. 63 (1965) (inference of knowledge from presence at illegal still); Barnes v. United States, 412 U.S. 837 (1973) (inference that person in possession of recently stolen property knew property was stolen). Rivera v. Delaware, 20 Cr.L. Rptr. 4030 (October 21, 1976) (Supreme Court dismissed appeal for want of a substantial federal question upholding Delaware statute that requires defendant raising an insanity defense to prove illness by a preponderance of the evidence. See also, People v. Laietta, 30 N Y 2d 68 (1972), cert denied 407 U.S. 923 (affirmative defense of entrapment upheld); People v. Bornholdt, 33 N Y 2d 75 (1973), cert denied sub nom. Victory v. New York 416 U.S. 905 (1974) (affirmative defense to felony murder upheld).

The only shifts in burdens of proof which the Court in Mullaney condemned were those that "denigrated" the interests found in In Re Winship, supra at 363-364, namely, defendant's potential loss of liberty, the stigma of conviction and society's right not to be in doubt whether innocent men are being condemned. In Mullaney, the liberty interest was diminished by the large disparity in punishment between murder and manslaughter which spanned from a mere possible fine for manslaughter to life imprisonment for murder. In our cases, the disparity in sentences between robbery in the first and second degrees is a maximum of ten years. Moreover, one cannot argue that a greater stigma attaches to a defendant who is convicted of robbery in the first degree as opposed to one convicted of second degree robbery. However, the stigma between murder and manslaughter is blatantly evident.

In Mullaney, the Supreme Court in its concluding footnote (p. 703 fn. 31) indicated that the due process clause is satisfied if certain standards are met concerning affirmative defenses citing Ashford and Risinger, Presumptions, Assumptions and Due Process in Criminal Cases: A Theoretical Overview, 79 Yale Law Journal 165 (1969). This article established standards which, if satisfied, would make a presumption - affirmative

defense statute constitutionally viable. The authors employ the "comparative convenience" and "rational connection" standards to determine the constitutionality of shifts in the burden of proof to a defendant in a criminal trial.* See Romano v. United States, 382 U.S. 136 (1965) (rational connection); Morrison v. California, 291 U.S. 82 (1934) (comparative convenience). In order for an affirmative defense to be valid, there must be a strong rational connection between the fact proved and the fact presumed, a substantial initial procedural hardship for the prosecution in proving the fact presumed and a surmountable burden for the defendant to prove the negative of the fact presumed.

Applying these tests to § 160.15(4), it is manifest that the affirmative defense in the robbery statute is in full compliance with due process. There is a substantial rational connection between the fact proved, display of a firearm during the robbery, and the fact presumed, that the gun is loaded and operable because the presumption that the gun is loaded makes the robbery possible. When a robber, as in both cases at bar, puts a gun to the victim's head and demands money, he is forcing his victim on pain of death to presume that the gun is loaded. Consequently, it is not offensive to due process, when the gun is not fired or recovered, to permit the jury to presume the

* The Court in People v. Felder, supra, utilized these tests in upholding the constitutionality of § 160.15(4).

very fact that the robber forces his victim to presume. See Baker v. United States, 412 F. 2d 1069 (5th Cir. 1969), cert denied 396 U.S. 1018; United States v. Marshall,427 F. 2d 434 (2d Cir. 1970).

Producing evidence on the question of whether a fire-arm is loaded or operable creates a substantial procedural hardship for the prosecution because this..."is information uniquely within the knowledge of the defendant and 'will, rarely, if ever, be established by the prosecution when the actor does not fire the weapon or the weapon is not immediately recovered.'" People v. Felder, supra at 376, quoting from the Practice Commentaries to § 160.15(4). If the prosecution was required to prove that a gun was operable in order to secure a conviction for first degree robbery, every robber would discard his weapon immediately after committing the crime. The statute would become useless except where the gun was fired or recovered. Since the condition of an unrecovered weapon is seldom susceptible of proof, it is infeasible to shoulder the prosecution with such a task.

Finally, as to the ease of proof of the negative of the presumption, defendants would have no problem in rebutting the presumption. As indicated in People v. Felder, supra, a defendant would merely have to present some evidence either by

testifying or producing evidence by others that the gun used in the robbery was unloaded or inoperable. Since the defendant is not compelled to testify in order to take advantage of the affirmative defense, he is not compelled to be a witness against himself. People v. Felder, supra. The Court in Yee Hem v. United States, supra, stated at 185:

> "If the accused happens to be the only repository of the facts necessary to negative the presumption arising from his possession, that is a misfortune which the statute under review does not create but which is inherent in the case."

The constitutionality of § 160.15(4) has also been upheld in Poveromo v. Ternullo, 76 Civ. 224, Platt, J. (E.D.N.Y. November 19, 1976); People v. Cwikla, 54 A D 2d 80 (1st Dept. 1976); People v. Archie, supra. In Poveromo v. Ternullo, the Court, quoting approvingly from Judge Metzner's decision in Farrell, rejected petitioner's contention that § 160.15(4) was unconstitutional. The Court in People v. Archie, supra, distinguished at length between the New York robbery statute and the Maine homicide statute, and observed:

> "...[i]n an apparent gesture of solicitude toward those stalwart enough to rob with toy, imitation or empty guns, the Legislature enacted the statutory scheme claimed wanting herein.... The statutory scheme goes no further than to permit the isolation, after guilt has been demonstrated beyond reasonable doubt on proof unaided by presumption, of those defendants claiming inability to complete the assault threatened in robbery by reason of facts which usually will be known only to themselves."
> People v. Archie, supra at 249-250, 251.

It is abundantly clear that there is no constitutional infirmity in § 160.15(4) and that the affirmative defense which it makes available is a benefit to the defendant. The presumptions and affirmative defenses in Mullaney* and the cases at bar are completely dissimilar. In Mullaney, the fact presumed, malice aforethought, is an essential element of the offense and traditionally an element which the prosecution has to prove beyond a reasonable doubt. In contrast, the fact presumed in the instant cases, a loaded firearm, is not an element of the crime of robbery and not an element which the prosecutor has the burden to prove. Accordingly, due process is not offended in a robbery prosecution by permitting a defendant to show, after the prosecutor has proved the defendant's guilt, by demonstrating a forcible taking and a display of what appears to be a weapon, that the firearm was not loaded. See Farrell v. Czarnetzky, supra at 5.

* The decision in Mullaney should not be given retroactive effect since both convictions (May 29 and June 4, 1974) preceded Mullaney which was rendered on June 9, 1975. The affirmative defense in § 160.15(4) does not affect the "integrity of the factfinding process" and could not possibly be interpreted to present a "clear danger of convicting the innocent." See Johnson v. New Jersey, 384 U.S. 719, 727-728 (1966) and cases cited therein; Linkletter v. Walker, 381 U.S. 618 (1965); Williams v. United States, 401 U.S. 646 (1971); Kaiser v. New York, 394 U.S. 280 (1969); Daniels v. Louisiana 95 S.Ct. 704 (1975).

CONCLUSION

THE CONSTITUTIONALITY OF SECTION 160.15(4) OF THE PENAL LAW SHOULD BE UPHELD. THE ORDER OF THE DISTRICT COURT IN FARRELL V. CZARNETZKY SHOULD BE AFFIRMED. THE ORDER OF THE DISTRICT COURT IN REIDOUT V. HENDERSON SHOULD BE REVERSED AND THE WRIT OF HABEAS CORPUS DISMISSED.

Dated: New York, New York
December 3, 1976

Respectfully submitted,

LOUIS J. LEFKOWITZ
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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Rosalba Federici , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Respondent-Appellee-Appellant herein. On the 3rd day of DECEMBER , 1976 , she served the annexed upon the following named person :

BARRY BASSIS, ESQ.
LYNN WILIFAHEY
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Attorneys in the within entitled Appeal by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorneys at the address within the State designated by them for that purpose.

Rosalba Federici

Sworn to before me this
3rd day of DECEMBER , 1976

Kenneth J. McKay
Assistant Attorney General
of the State of New York